Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 291

DONALD R. McVEAN,

PETITIONER,

VS.

STATE OF FLORIDA,

RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

EARL FAIRCLOTH
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TOPICAL INDEX TO BRIEF

	Page
OPINION BELOW.	1,2,3
JURISDICTIONAL STATEMENT	3
QUESTIONS PRESENTED	3-4
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	4
ARGUMENT	5-10
POINT I	5-8
POINT II	9-10
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

	PAGES
Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512(1962)	5
Brown v. Allen, 344 U.S. 443 at 471, 73 S.Ct. 397, at 414, 97 L.Ed. 469(1954)	6
Commonwealth v. Slaney, 350 Mass. 400, 215 N.E.2d 177 (1966)	6
Ex parte, Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152 (1933)	5, 8
Garner v. Louisiana, 368 U.S. 157	10
Jacobs v. Tawes, 250 F.2d 611 (4 Cir. 1957)	5
King v. United States, 346 F.2d 123 (1 Cir. 1965)	7
Louisville etc., R.Co. v. Holloway, Ky., 246 U.S. 525 (1918)	10
Pope v. United States, 372 F.2d 710, 723 (8 Cir.1967)	7
Speiser v. Randall, 357 U.S.	

	PAGES
513 (1958) Note 7 at p. 523	9
United States v. Golden, 235 F.Supp. 1020 (D. Mass. 1964)	6, 7
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 20 L. Ed.2d 710, 723	7

OTHER AUTHORITIES

Chapter 40, Florida Statutes	5, 7
28 U.S.C., Section 1257(3)	5, 9, 10
U.S.C.A., Section 1257 and cases cited in Note 94	5, 9, 10

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OPINION BELOW

The petition filed herein seeks to review the decisions of the District Court of Appeal of Florida, Second District. The first judgment and sentence was entered on October 24, 1969, rehearing denied November 20, 1969, affirming the judgment and sentence entered on December 11, 1968 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced petitioner to imprisonment for a term of from six months to five years for the crime of possession of marijuana. The second judgment was entered on December 31, 1969, per curiam, rehearing denied February 5, 1970, affirming the judgment and sentence entered on May 23, 1969 by the

Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of selling marijuana, said sentence to run consecutively to the prior sentence imposed.

A petition for writ of certiorari in the first case of possession was dismissed by the Supreme Court of Florida on January 30, 1970, for alleged procedural error, rehearing denied February 24, 1970. A petition for writ of certiorari in the second case of selling was dismissed by the Supreme Court of Florida for lack of jurisdiction on April 8, 1970. The petition in this second case was unaccompanied by the entire record, the same procedural error which occasioned the dismissal of the petition in the first case.

The opinion of the District Court of Appeal of Florida, Second District, in the first case of "possession" is reported at 227 So.2d 535 of Petitioner's Brief, together with a copy of the order denying rehearing entered on the 20th day of November, 1969, Appendix, p. 13 of Petitioner's Brief. The order of the Supreme Court of Florida granting a motion to dismiss, Appendix, p. 17 of Petitioner's Brief, and the order denying the petition for rehearing dated the 24th day of February, 1970 are set out in the Appendix, p. 19 of Petitioner's Brief.

The per curiam opinion of the District Court of Appeal of Florida, Second District, in the second case of "selling" is reported at 230 So.2d 507(2) and is set out in the Appendix, p. 20 of Petitioner's Brief, together with a copy of the order denying rehearing entered on the 5th day of February, 1970, Appendix, p. 21 of Petitioner's Brief. The order of the Supreme Court of Florida denying the Petition for Writ of Certiorari for lack of jurisdiction is set out in Appendix, p. 22 of Petitioner's Brief.

JURISDICTIONAL STATEMENT

Respondent admits that the basis for jurisdiction for this Court to entertain said petition is conferred by 28 U.S.C. §1257(3). Accordingly, to the extent that there exists substantial federal questions properly presented and passed upon by the District Court of Appeal of Florida, Second District, this Court may, in the exercise of its discretionary jurisdiction, review said decision.

QUESTIONS PRESENTED

1. Whether the exclusion by law from Florida juries of persons between the ages of seventeen and twenty-one years of age violates the Fourteenth Amendment

to the United States Constitution as to a defendant in this age group who is not protected by special juvenile court laws.

2. Whether a criminal conviction in a Florida court and its affirmance on appeal violates the due process clause of the Fourteenth Amendment where the defense of entrapment has been raised and the prosecution fails to offer any proof thereafter that the intent to commit the crime arose in the mind of the accused rather than in the mind of the police officer.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as the same appears on pages four through five of Petitioner's Brief inasmuch as it is supported by the record and is not argumentative in nature.

STATEMENT OF THE FACTS

The pertinent facts relative to the questions before the Court are contained in the body of this Brief under the appropriate questions.

ARGUMENT

POINT I

WHETHER THE EXCLUSION BY LAW FROM FLORIDA JURIES OF PERSONS BETWEEN THE AGES OF SEVENTEEN AND TWENTY-ONE YEARS OF AGE VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS TO A DEFENDANT IN THIS AGE GROUP WHO IS NOT PROTECTED BY SPECIAL JUVENILE COURT LAWS.

Petitioner asserts that Chapter 40 of the Statutes of the State of Florida, providing that the minimum age for jurors be twenty-one years, is unconstitutional. Respondent's position is that such contention does not present a substantial federal question as required by 28 U.S.C., Section 1257(3). "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152 (1933). See also Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); Jacobs v. Tawes, 250 F.2d 611 (4 Cir. 1957).

Petitioner cites no case holding a similar statute unconstitutional and Respondent has been unable to find same.

Such statutes have existed in Florida and in most other states for many years. On the other hand, this Court in Brown v. Allen, 344 U.S. 443, at 471, 73 S.Ct. 397, at 414, 97 L.Ed. 469 (1954), said:

> "* * * It was explained in 1880 by this Court, when composed of justices familiar with the evils the Amendment sought to remedy, as permitting a state to 'confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications'. Strauder v. West Virginia, 100 U.S. 303, 310." (Emphasis Added)

The requirement that a juror be at least twenty-one years of age is not unreasonable. A similar statute (age 25) has been in effect in Massachusetts for many years. It was applied to the selection of jurors in the United States District Court for the District of Massachusetts by statute before 1957, and by practice thereafter. The statutes and the practice have been held not to violate the federal constitution by the Supreme Court of Massachusetts; the District Court and the First Circuit Court of Appeals. Commonwealth v. Slaney, 350 Mass. 400, 215 N.E. 2d 177 (1966); United States v. Golden,

235 F.Supp. 1020 (D. Mass. 1964); King v. United States , 346 F.2d 123 (1st Cir. 1965). See also Pope v. United States, 372 F.2d 710, 723 (8th Cir. 1967).

In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 this court struck down the Illinois statute, which excluded from a jury veniremen having conscientious scruples against or opposed to capital punishment, without stating that they would automatically vote against the imposition of such punishment no matter what the trial revealed. This court held that such action fell short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments. In the case sub judice Petitioner has not shown this Court how persons in the excluded age category would effect the impartiality to which this Petitioner is entitled. Respondent would respectfully submit that there is no evidence whatsoever that persons in the excluded age category would have views any different from those of persons allowed to serve on a Florida jury by Chapter 40, Florida Statutes (1969). In Witherspoon, supra, the petitioner was able to demonstrate that the Illinois statute then in force directly affected the penalty which a jury picked under such statute would render. The petitioner in Witherspoon, supra, was unable however to demonstrate how such selection affected the verdict

said jury would render. This Court therefore reversed as to the penalty but declined to reverse the verdict of guilt.

Respondent respectfully submits that in the absence of some showing on the part of Petitioner, of exactly how the excluded age group would effect Petitioner's verdict, that such verdict must stand. Admittedly the age of twenty-one years does not possess any mystical power, however neither does the age seventeen, nor the age eleven. The point being, the Legislature of the State of Florida chose the minimum age for jurors in Florida to be twenty-one years. The Petitioner has not demonstrated how this adversely affected the verdict in the instant case and in the absence of such showing Respondent submits that the verdict was rendered ". . . by the lawful judgment of his peers and by the law of the land." Magna Carta.

It is Respondent's position that the contention that the twenty-one year requirement is unconstitutional is plainly unsubstantial, under the test prescribed in Ex Parte Poresky, supra.

POINT II

WHETHER A CRIMINAL CONVICTION IN A FLORIDA COURT AND ITS AFFIRMANCE ON APPEAL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE THE DEFENSE OF ENTRAPMENT HAS BEEN RAISED AND THE PROSECUTION FAILS TO OFFER ANY PROOF THEREAFTER THAT THE INTENT TO COMMIT THE CRIME AROSE IN THE MIND OF THE ACCUSED RATHER THAN IN THE MIND OF THE POLICE OFFICER.

The Petitioner's complaint regarding the trial judge's refusal to give certain requested instructions and his instructions as given, which actions the District Court of Appeal of Florida, Second District affirmed in the opinions sought to be reviewed, utterly fails to raise any federal question required by 28 U.S.C. §1257(3) to confer jurisdiction on this Court.

There can be no question but that the District Court of Appeal of Florida, Second District was judicially construing a matter of substantive state law. This Court has consistently stated as a ". . . basic constitutional principle that the constructions of state laws is the exclusive responsibility of the state courts. . ." Speiser v. Randall, 357 U.S. 513 (1958), note 7 at p. 523.

In Garner v. Louisiana, 368 U.S. 157 this Court stated:

> ". . . We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court. Hence, we must look to Louisiana for guidance in the meaning of the phrase 'foreseeably disturb or alarm the public' in order to determine the type of conduct prescribed by La Rev Stat, 1950, §14:103(7)."

See also: U.S.C.A. §1257 and cases cited in Note 94.

By like token, the construction of substantive state law in regard to a jury instruction on entrapment has been made by the District Court of Appeal of Florida, Second District. This Court by its own pronouncement is bound thereby. No federal question is presented by Petitioner's Question II. Indeed, this Court has specifically held correctness of jury instructions ". . . is a question of local law, with which we have no concern. . ." Louisville etc., R. Co. v. Holloway, Ky.,

246 U.S. 525 (1918).

CONCLUSION

For the reasons set forth hereinabove, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Brief of Respondent In Opposition To Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District to Honorable Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, Attorney For Petitioner, this _____ day of November, 1970.

JOHN A. ZEBEDEE
Assistant Attorney General

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v.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

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PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

Petitioner, Donald R. McVean, respectfully prays that this Honorable Court grant his petition for a Writ of Certiorari to the District Court of Appeals of Florida, Second District, heretofore submitted in this cause and as grounds therefor constituting intervening circumstances of substantial or controlling effect and substantial grounds available to petitioner although not previously presented, states the following:

Point I.

THE CONGRESS OF THE UNITED STATES, SINCE THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI, HAS ENACTED THE VOTING RIGHTS ACT OF 1970 LOWERING THE VOTING AGE IN NATIONAL ELECTIONS TO EIGHTEEN YEARS OF AGE EFFECTIVE JANUARY 1, 1971.

Point II.

A Sentence of Six Months to Five Years for "Possession" of Marijuana and an Additional Sentence of Six Months to Five Years for "Sale" of Marijuana, to Run Consecutively, in a Prison Nationally Reported as "Inhuman and Horrible", in the Light of Present Scientific Evidence Surrounding the Harms of the Use and Possession of Marijuana, Constitutes Cruel and Unusual Punishment Contrary to the Guaranty of the Eighth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE PETITION.

Point I.

The Congress of the United States, Since the Filing of the Petition for a Writ of Certiorari, Has Enacted the Voting Rights Act of 1970 Lowering the Voting Age in National Elections to Eighteen Years of Age Effective January 1, 1971.

Petitioner, in his Petition for Writ of Certiorari, assigned as Point I in support of said Petition, the following:

"THE EXCLUSION BY LAW FROM JURIES OF PERSONS IN A CERTAIN AGE CATEGORY, NOT OTHERWISE PROTECTED BY SPECIAL JUVENILE COURTS, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT."

The Congress of the United States in enacting the Voting Rights Act of 1970 stated the following:

"Sec. 301(a) The Congress finds and declares that the imposition and application of the requirements that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibility imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment to the Constitution; and

(3) does not bear a reasonable relationship to any compelling state interest.

(b) In order to secure the constitutional rights set forth in subsections (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen year of age or over."

Approved June 22, 1970 to take effect after January 1, 1971 and upheld by this Court on December 21, 1970.

Point II.

A Sentence of Six Months to Five Years for "Possession" of Marijuana and an Additional Sentence of Six Months to Five Years for "Sale" of Marijuana, to Run Consecutively, in a Prison Nationally Reported as "Inhuman and Horrible", in the Light of Present Scientific Evidence Surrounding the Harms of the Use and Possession of Marijuana, Constitutes Cruel and Unusual Punishment Contrary to the Guaranty of the Eighth Amendment to the Constitution of the United States.

A. What Are the Harmful Effects of Marijuana That Make Its "Use" or "Possession" a Crime in Every State in the United States?

1. "Neither the ingestion of marihuana nor the smoking of marihuana cigarettes affects the basic outlook of the individual except in a very few instances and to a very slight degree. . . . In other words reactions which are natively alien to the individual cannot be induced by the ingestion or smoking of the drug. . . . Other effects of marijuana use, however, are not similar to alcohol. The long term psychological effects of marijuana use, unlike those of alcohol, are not neurosis or psychotic illness. Also, for most people the use of marijuana does not result in socially aggressive activity, which frequently does result from the use of alcohol.

There do not appear to be any long-term effects from the use of marijuana except perhaps a form of generalized fatigue. The major distinction between marijuana and 'hard narcotics' is that marijuana is not addictive, but like tobacco, is capable of inducing habitual use. In fact, it appears easier to stop smoking marijuana than it does to stop smoking tobacco. Being nonaddictive, marijuana use does not result in physical dependence or tolerance. . . ."[1]

2. "Virtually all scientists who have studied marijuana agree that it is not addictive. There is no reason to believe that its use, even in a minority of cases, directly causes experimentation with drugs that *are* addictive. In 1894, the Indian Hemp Drug Commission reported that it could find no factual support for fears that marijuana-type drugs cause crime, insanity or "moral injury"; the U. S. Canal Zone report of 1925 and the New York Mayor's Committee on Marijuana of 1943 also failed to find any such evidence. The Canal Zone investigation, conducted by the U. S. Army, concluded that alcohol was a more serious problem. Recent tests by the Washington State Motor Vehicles Department found that marijuana does not significantly impair driving ability. No statistical study has yet linked this drug to cancer, heart disease or emphysema, as cigarette smoking has been linked. The 1968 Zinberg-Weil-Nelsen study at Boston University found no lasting impairment of intellectual performance among marijuana users. If marijuana does have any serious adverse effects, they have so far eluded detection."[2]

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1. Excerpt from Vol. 13, *Villanova Law Review*, pps. 852 and 853. The article, "Marijuana and the Law: The Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use", cites extensively from "LaGuardia Report—THE MARIJUANA PAPERS" and every other available report up to date of its publication, Summer of 1968.

2. Excerpt from "An Open Letter to the Parents of Robert F. Kennedy, Jr., and R. Sargent Shriver, III", *Playboy Magazine*, November 1970 issue, page 66.